provides further evidence that the average commercial station is broadcasting substantial and increasing amounts of educational and informational children's programming.[37] By contacting stations that did not respond to its 1994 survey to supplement the responses obtained in that survey, the NAB has now ascertained that the average weekly amount of regularly scheduled educational and informational programming aired by commercial broadcast stations during Fall 1993 was over 3-3/4 hours (225.85 minutes), an increase of 85.1 percent over Fall 1990 levels.[38] The 1995 Study also found that the broadcast by commercial television stations of educational and informational programming continued to grow from 1993 to 1994. Based on responses from 559 stations, representing 59.7 percent of the stations contacted, the Study found that the average

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[37] The 1994 Study was based on responses to an NAB questionnaire submitted by 286 commercial television stations, representing 31.1 percent of the 920 stations to which the questionnaire was sent. For purposes of responding to the questionnaire, the NAB asked the stations to include as "educational and informational" only programming which in the judgment of the station met the following definition: "Programming originally produced and broadcast for an audience of children 16 years old and younger which serves their cognitive/intellectual or social/emotional needs." 1994 NAB Study at Appendix 1. In the instant Notice, the Commission suggested that stations choosing to respond to the NAB questionnaire "may have made a more significant effort to provide educational programming than those that did not respond, which may have resulted in an overstatement of the effort being made by commercial television broadcasters overall." (¶18).

In response to this criticism, the NAB sent questionnaires to previously non-responding stations as well as to previously responding stations for its 1995 Study, asking for data about both Fall 1993 and Fall 1994 educational and informational programming. These efforts increased the responses for Fall 1993 to 573 stations and established that on average the non-responding stations actually aired slightly more informational and educational programming in Fall 1993 than did the stations that had responded to the earlier survey. 1995 NAB Study at 3-4. The high level of response, nearly doubling the 31.1 percent response rate of the earlier survey, would appear clearly to answer the criticism that the NAB's earlier findings may have overstated commercial broadcasters' efforts in the children's programming area.

[38] 1995 NAB Study at 3 and Figure 1.

commercial station broadcast over four hours (244.74 minutes) of regularly scheduled educational and informational children's programming per week during Fall 1994.[39]

The 1995 NAB Study also found there were steady increases from 1990 through 1994 in educational and informational children's programming broadcast by affiliates of each of the four networks. By Fall 1994, the average affiliate of each network was broadcasting no less than 3-1/4 hours of regularly scheduled educational and informational children's programming per week.[40] Network-supplied programming represents a significant portion of the educational and informational programming broadcast by affiliates.[41] Currently ABC, NBC and Fox provide between two to three hours per week of educational and informational programming to their affiliates. And Westinghouse Electric Corporation has announced its plans to increase the amount of educational and informational programming on the CBS Television Network to three hours per week by the 1997-98 television season, following consummation of its contemplated acquisition of CBS.

Moreover, significant numbers of syndicated educational and informational programs for children have premiered since the adoption of the Act which were not previously available. For example, the INTV study submitted in response to the NOI reveals an increase in the number of

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[39] Id. at 4 and Figure 1.

[40] The averages by network were as follows: NBC (199 minutes); CBS (205 minutes); ABC (238 minutes); and Fox (346 minutes). 1995 NAB Report at 6 and Figure 2.

[41] Since 1990, the networks have introduced such qualifying programs as BEAKMAN'S WORLD, NATIONAL GEOGRAPHIC'S REALLY WILD ANIMALS, FREE WILLY, JIM HENSON'S NATURE SERIES, JOHNSON AND FRIENDS, RIMBA'S ISLAND, CALIFORNIA DREAMS and HANG TIME.

children's educational and informational syndicated programs from eight in 1990 to 19 in 1993.[42] This rise of nearly 150% in available syndicated programming does not account for additional programs that have become available since 1993.

The above record, we submit, hardly indicates a need for new regulatory initiatives.[43] In this regard, we note the Commission's suggestion that it might monitor the performance of licensees for a specified period -- for example three years -- prior to considering further the imposition of mandatory programming standards. While CBS supports this concept, we wish to

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[42] See Statement of Peter Walker, June 28, 1994, filed in MM Docket No. 93-48, June 15, 1994, at Exhibit A. The INTV study also demonstrated a threefold increase in the number of stations broadcasting educational and informational programming during the same period.

The Notice questions the INTV study by expressing skepticism as to whether one can "accept at face value station claims as to the educational content of their programming." Notice at ¶18. In fact, however, INTV listed each of the programs which was considered to be educational or informational by the study -- a list which included such programs as Bill Nye The Science Guy, National Geographic, Nick News, and What's Up Network. We respectfully submit that the Commission may take administrative notice of the fact that a licensee would be well within its reasonable discretion in considering the programs listed in the INTV study -- programs which are distributed nationally and the content of which is well known within the industry -- as being ones which would qualify as a "core" program under the Act, using the Commission's proposed definition. To ignore INTV's finding would be simply to turn a blind eye to the increasing numbers of qualifying programs coming into the syndication market.

[43] The fact that most stations are now apparently broadcasting more than three weekly hours of educational and informational children's programming provides no basis for adopting a legal requirement that every station do so. As we have shown, while the Children's Television Act contemplates that all commercial television stations will broadcast at least some educational and informational programming for children, Congress clearly intended that individual stations would retain the discretion to determine the specific amounts of such programming which they would present. See pp. 13-14, supra. In the absence of evidence that reasonable amounts of educational and informational children's programming are not available in the marketplace as a whole, there is no sound basis -- either in the Act or as a matter of policy -- for the imposition of uniformly applicable quotas. Moreover, the fact that stations choose to air particular amounts of a certain kind of programming does not mean that a rule requiring them to do so would be constitutional.

make clear what we believe should properly be studied in such a review. We believe that, in such a study, the Commission should examine (1) whether licensees are meeting their statutory obligation to present at least some "core" programming which is specifically designed to meet the educational and informational needs of children and (2) whether educational and informational children's programs are available in the overall marketplace to a substantial majority of viewers during a significant percentage of the hours when children are most likely to be viewing. Such a study would properly focus on the only question that can be of legitimate concern to parents and this Commission -- whether there is a reasonable opportunity, in the marketplace as a whole, for parents to select educational and informational programs for their children's viewing. It should therefore comprehensively document all educational and informational programming available, whether through commercial broadcast stations, public broadcast stations, cable channels or other sources. If, as we expect, a careful study would answer the above questions in the affirmative, it is difficult to conceive of the regulatory justification for requiring all commercial television stations to adhere to a government-imposed notion of how much children's programming is enough.

C. The Commission Has Repeatedly Rejected Proposals for Quantitative Programming Rules And Its Adoption of Such Rules Now Would Constitute an Unjustified Departure from Prior Precedent.

Over many years, the Commission has repeatedly rejected the adoption of quantitative standards for children's programming, often invoking its traditional "caution in approaching the regulation of programming" and its general policy of applying the public interest standard to programming by "imposing only general affirmative duties" and leaving the licensee "broad

discretion in giving specific content to these duties."[44] In its 1974 Children's Report, the Commission declined to prescribe a minimum number of hours of educational children's programming that licensees would be required to broadcast in light of the First Amendment issues raised and the Commission's policy of "avoid[ing] detailed governmental supervision of programming whenever possible." 50 FCC 2d 1, 3, 6 (1974). On reconsideration of this determination, the Commission reiterated its "policy decision to avoid rules which would specify numbers of hours to be devoted to children's programming [and instead] to encourage licensee responsibility and industry self-regulation." In addition to the constitutional reasons for this approach, the Commission noted that because "considerations as to what constitutes a 'reasonable amount' may vary," it "believe[d] it is desirable to avoid rules which are unnecessarily broad and inflexible." Action for Children's Television, 55 FCC 2d 691, 693 (1975). The Commission again declined to adopt mandatory children's programming requirements in 1983, noting "[p]rogramming quota systems have been viewed historically as fundamentally in conflict with the statutory scheme of broadcast regulation." Children's Television Programming and Advertising Practices, 55 RR 2d 199, 211 (1984).

The Commission adhered to this approach in implementing the Children's Television Act. See Report and Order, 6 FCC Rcd at 2115 (1991) (quantitative programming rules not adopted to

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[44] Children's Report, 50 FCC 2d at 3 (quoting Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969). See also, e.g., Children's Television Programming and Practices, 96 FCC 2d 634, 651-52 (1984) (Commission has never "found it either desirable from a policy perspective or acceptable from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public obligations of licensees"). The Commission's approach in the area of children's programming has mirrored its general avoidance of "program dictation." Report and Statement of Policy re: En Banc Programming Inquiry, 44 FCC 2303, 2309 (1960); see also Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

implement Act in light of legislative history, and "the latitude afforded broadcasters in fulfilling the programming requirements"). See also Reconsideration Order, 6 FCC Rcd at 5100 (quantitative guidelines would "conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion" and would "tend to make compliance overly rigid, as broadcasters seek to meet the criteria in order to insulate themselves from further review.")

An administrative agency must articulate a rational basis for departing from its prior positions.[45] In this proceeding, no such basis has been shown for the Commission's departure from its longstanding and consistent rejection of quantitative programming standards.

D. Quantitative Programming Rules Would Violate the First Amendment.

In the Notice, the Commission recognizes that the imposition of quantitative requirements raises First Amendment questions, and appears to acknowledge that they are content-based restrictions on speech. (Notice at ¶66). The Commission seeks comment as to whether the proposed quotas might pass constitutional muster as narrowly tailored restrictions furthering a substantial governmental interest. (Id.) CBS submits that the Notice seriously understates the gravity of the Commission's proposal. There should be no mistaking that

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[45] See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obliged to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); see also, e.g., Pittsburgh Press Co. v. NLRB, 977 F. 2d 652, 655 (D.C. Cir.1992) (agency has duty to give reasoned justification for departure from prior policy and to present its decision in such form as to enable a reviewing court to determine whether the decision is rationally related to the findings and supported by substantial evidence); Nat'l Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 669 (D.C. Cir. 1988); CBS v. FCC, 454 F. 2d 1018 (D.C. Cir. 1971).

mandatory programming quotas are unprecedented and would violate licensees' First Amendment rights. As shown below, they are content-based regulations that interfere with licensees' editorial judgment, would draw the Commission into subjective evaluations of program content, and cannot be justified as a narrowly tailored means to serve the government's interest.[46]

Under existing precedent, it is clear that the Commission, without violating the First Amendment, may generally interest itself in the kinds of programming that are broadcast as part of its authority to ensure that licensees are operating in the public interest. But the Commission has never adopted, and the courts have never endorsed, specific rules requiring licensees to broadcast prescribed amounts of programming in any particular category. In recognition of the First Amendment issues implicated by the regulation of program content, the Commission has consistently "walk[ed] a tightrope" by "imposing only general affirmative duties" while leaving the licensee "broad discretion in giving specific content to these duties."[47] The Commission has recognized that this "traditional approach" has allowed it "to assure programming service in the

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[46] The recent decision in Action for Children's Television v. FCC, 58 F. 3d 654 (D.C. Cir. 1995)(en banc), lends no support to the kind of regulation under consideration here. In that case, a divided court upheld statutory provisions and FCC regulations requiring the channeling of patently offensive material relating to sexual or excretory activities to particular time periods in order to protect children from exposure to it. Nothing in the majority opinion supports the imposition of an affirmative requirement to broadcast a particular amount of programming of a type favored by the government. Moreover, the majority in Action for Children's Television found the channeling of indecent programming to a "safe harbor" to be a narrowly tailored means to serve a compelling interest in protecting children. The imposition of mandatory programming requirements cannot be considered a narrowly tailored means of serving any compelling governmental interest, particularly in the absence of a clear showing that children and parents lack access to reasonable amounts of educational and informational programming.

[47] Children's Report, 50 FCC 2d at 3 (quoting Banzhaf v. FCC, 405 F. 2d at 1095).

public interest and, at the same time, avoid excessive governmental interference with specific programming decisions."[48]

The courts have made clear that the line between the Commission's articulation of general affirmative obligations and the adoption of rules which would interfere with specific programming decisions is not simply a policy question but rather a distinction required by the First Amendment. None of the authorities cited in the Notice, including Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), provides support for quantitative programming rules.

In upholding the constitutionality of particular aspects of the fairness doctrine, the Court in Red Lion held that the Commission could require a licensee which had chosen to present specific types of programming -- personal attacks or political editorials -- to "make available a reasonable amount of time to those who have a different view." 395 U.S. at 391. In doing so, the Court upheld the constitutionality of the Commission's rules establishing a right of reply for those persons specifically attacked on a licensee's airwaves in specified circumstances, and in no way suggested that the Commission could mandate particular programming content that licensees could be required to broadcast. Emphasizing the limited nature of its decision, the Court in Red Lion stated,

> We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the ... the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.

Id. at 396.[49]

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[48] Id. at 3.

[49] Of course, the Commission itself has reached the conclusion that the fairness (continued...)

Cases decided since Red Lion have warned that the First Amendment prohibits the Commission from extending its authority to regulate in the public interest to the adoption of specific programming quotas. In National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 536, (2d Cir. 1975), the court reviewed the Commission's decision to exempt certain categories of network programming, including children's programming, from the prime time access rule. The court upheld the rules against constitutional challenge, noting that the Commission was "not ordering any program or even any type of program to be broadcast";[50] however, it cautioned that "mandatory programming rules by the Commission even in categories would raise serious First Amendment questions." Similarly, the D.C. Circuit's decision in National Black Media Coalition v. FCC, 589 F. 2d 578 (D.C. Cir. 1978), strongly suggests that mandatory programming rules would be unconstitutional. There the court affirmed the Commission's decision not to adopt quantitative standards for use in comparative renewal proceedings, observing that this approach would "subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission." Id. at 581.

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[49](...continued)
doctrine is unconstitutional, in significant part because of its conclusion that "the scarcity rationale developed in the Red Lion decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." Syracuse Peace Council, 2 FCC Rcd 5043, 5053 (1987), aff'd on other grounds, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). In the absence of the scarcity rationale, as the Commission has acknowledged, full First Amendment protections against content regulation should apply to broadcasters. 2 FCC Rcd at 5057, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). While the Supreme Court has not repudiated Red Lion, it is surprising that the Commission should now entertain regulatory proposals that, by its own reasoning in Syracuse Peace Council, must be viewed as unconstitutional.

[50] 516 F. 2d at 536, 537.

Only a year ago, in Turner Broadcasting System v. FCC, 114 S. Ct. 2445 (1994), the Supreme Court clearly suggested that specific content-based programming requirements, including those for children's educational and informational programming, would not survive constitutional scrutiny. In Turner, the Court considered the argument that the Commission's must-carry rules were content-based because the rules' "preference for broadcast stations automatically entails content requirements."[51] The basis for this contention was that the Commission allegedly regulates the content of broadcast licensees' programming, but not cablecasters' programming, and that by forcing cablecasters to carry broadcast signals, the rules imposed content-regulated broadcast programming on cable companies.

The Court acknowledged that broadcast programming "is subject to certain limited content restraints imposed by statute and FCC regulation," giving as its example the Commission's authority under the Children's Television Act to consider, as a general matter, the "extent to which [a] license renewal applicant has 'served the educational and informational needs of children'".[52] But the Court flatly rejected the contention that the must carry rules were content-based, explaining that this argument "exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming." Noting that the Commission "is barred by the First Amendment and [§326 of the Communications Act] from interfering with the free exercise of journalistic judgment," the Court concluded:

> In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although 'the Commission may inquire of licensees what they

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51 Id. at 2462 (internal quotes omitted, emphasis in original).

52 Id. at 2462 & n.7.

> have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'[53]

The Court reiterated this point with respect to noncommercial educational stations, which it said "are subject to no more intrusive content regulation than their commercial counterparts":

> What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of "education" programming or any particular "educational" programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve "the public interest, convenience or necessity." En Banc Programming Inquiry, 44 F.C.C. 2d 2303, 2312 (1960).[54]

The clear thrust of this discussion is that the Supreme Court would view children's programming quotas as a violation of licensees' First Amendment rights because they go far beyond the Commission's "limited" authority to consider, as a general matter, whether a licensee has served children's educational and informational needs.[55]

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[53] 114 S. Ct. at 2463 (quoting Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960).

[54] Id. at 2463

[55] Behind all these cases stands the established principle that the First Amendment protects speakers' rights to determine what material they will communicate -- both "what to say and what to leave unsaid." Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 11 (1986). Where government dictates a particular type and amount of material a speaker must publish, it unconstitutionally intrudes into the exercise of editorial control and judgment. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). The Supreme Court has affirmed the First Amendment interest in editorial freedom in the broadcast context. In upholding the Commission's refusal to impose an obligation on broadcasters to accept editorial advertisements, the Court noted the rights of editors in selecting material for publication and emphasized that the proposed requirement raised a "problem of critical importance to broadcast regulation and the First Amendment--the risk of an enlargement of Government control over the content of broadcast discussion of public issues." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 124-26 (1973) ("CBS v. DNC").

Moreover, the Supreme Court has held that the Commission may regulate broadcast content only where such restrictions are "narrowly tailored to further a substantial government interest." FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).[56] This standard is clearly not met on the present record. Given the lack of evidence that reasonable amounts of educational and informational children's programming are not currently available in the overall video marketplace, or that a significant number of commercial television licensees are ignoring their statutory obligation to present at least some standard-length programming in this category, the setting of a quota for such programming for every commercial broadcaster in the nation cannot be deemed a narrowly tailored restriction. Rather, such a requirement would constitute a particularly drastic form of content regulation, made all the more extreme by the fact that the Commission has historically rejected the imposition of such requirements. At the risk of repetition, we emphasize once more that there is simply nothing in the existing record which suggests that such rules are necessary to ensure the reasonable availability of educational and informational children's programming to these who wish to view it.[57]

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[56] The suggestion in the Notice (¶70) that League of Women Voters provides support for mandatory programming requirements is without basis. The Court's acknowledgment that it had previously upheld the general affirmative obligations mandated by the fairness doctrine and the reasonable access provisions of section 312(a)(7) in no way implies support for the imposition of specific programming quotas.

[57] Nor is there any merit in the suggestion, repeatedly rejected by the Commission, that quantitative requirements might be less intrusive on licensees' editorial discretion than the current rules. (See Notice at ¶72). In originally declining to adopt quantitative programming criteria to implement the Act, the Commission stated that it did not believe

> that quantitative processing guidelines would result in less government intrusion than if no such guidelines were established. Indeed, the very establishment of such guidelines would infringe on broadcaster discretion regarding the appropriate manner

(continued...)

E. The Adoption of License Renewal "Processing Guidelines" Would Be Effectively Equivalent to the Adoption of Mandatory Rules.

As an alternative to the imposition of mandatory programming requirements, the Notice suggests adoption of license renewal quantitative processing guidelines (¶56). In practice, there would be no difference between rules requiring the broadcast of particular amounts of educational and informational programming for children and processing guidelines indicating that these amounts would constitute a "safe harbor" for license renewal purposes. Such guidelines would be -- and would be intended to be -- coercive. Few broadcasters would be willing to risk the isolation of their license renewal applications for special scrutiny by the Commission because of their failure to meet a quantitative programming standard that would have made routine staff action on those applications possible. In fact, the NOI in this proceeding acknowledged that "processing guidelines in the renewal area can take on the force of a rule, at least in the perception of licensees."[58] And in a recent interview, the Commission's General Counsel expressed doubt that mandatory rules and processing guidelines would be "that different."[59] In sum, license renewal processing guidelines would operate no differently than an

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[57](...continued)
in which to meet children's educational and informational needs.

Memorandum Order and Opinion, 6 FCC Rcd at 5100 n.105. See also Action for Children's Television, 55 FCC 2d at 694 ("[P]ercentage guidelines cast in First Amendment Cloak as protective of licensees' stand the First Amendment on its head -- that is, they are equally subject to interpretation as an attempt to dictate specific program content.")

[58] 8 FCC Rcd 1841, 1843 & n.17 (citing Notice of Proposed Rulemaking in MM Docket No. 83-313, 94 FCC 2d 678, 696 (1983).

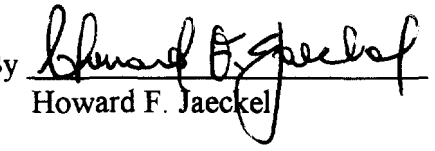
[59] Broadcasting and Cable, April 10, 1995, p. 76.

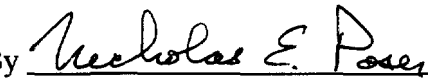
absolute rule requiring the broadcast of specific amounts of educational and informational children's programming.

Conclusion

As specified above, CBS believes that many of the proposals contained in the Notice designed to increase the flow of information to the public and to further define programming specifically designed to meet children's informational and educational needs are useful means of further implementing the Children's Television Act. CBS further believes that monitoring the amount of informational and educational programming over a specified period of time would be appropriate, if the purpose is to assess the overall availability of such programming in the marketplace. But CBS opposes the imposition of mandatory programming requirements or processing guidelines, which are inconsistent with the legislative history, without justification in the factual record, contrary to longstanding agency policy, and violative of licensees' First Amendment rights.

Respectfully submitted,
CBS Inc.

By 
Howard F. Jaeckel

By 
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